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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 504

JOSEPH F. SCHIPANI,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions and Statutes Involved	3
Statement of the Case	4
1. Introductory	4
2. The Basic Categories of the Trial Proofs	6
3. The Trial Proofs	8
a. Opening Cash In February 1943	8
b. The Proofs as to Petitioner's Subsequent Financial History—from 1943 to January 1, 1956, the "Opening Net Worth" Date	9
c. The Proofs as to Alleged Increases in Net Worth During the Prosecution Years	11
d. The Proofs on the Question of Whether the Alleged Net Worth Increases in the Prosecution Years Came from Unreported Currently Taxable Income (The Problem of "Likely Source")	13
e. The Proofs of Allocation of Net Worth Increases to Individual Years in the 5-year Indictment Period	16
f. The Proofs of Wilfullness	18
4. The Decision of the Court of Appeals	18
Reasons For Granting the Writ	19
Conclusion	40

PAGE

Appendix to Petition for Certiorari—
Bound in Separate Volume

APPENDIX A—Opinion of United States Court of Appeals A-1

APPENDIX B—Opinion by Bosling, U.S.D.J. A-14

APPENDIX C—Judgment of the United States Court of Appeals A-108

AUTHORITIES CITED

Cases

Barcott v. United States, 169 F. 2d 929 (C.A. 9 1948) 28
Bryan v. United States, 175 F. 2d 223 (C.A. 5), aff'd 338 U.S. 552 34
Costello v. United States, — U.S. —, 16 L. Ed. 2d 205, Oct Term 1965, no. 826 37
Demetree v. United States, 207 F. 2d 892 (C.A. 5 1953) 35
Dupree v. United States, 218 F. 2d 784 (C.A. 5 1955) 35
Ford v. United States, 237 F. 2d 57 (C.A. 2 1956) .. 30, 31
Friedberg v. United States, 348 U.S. 142 ..... 19, 28
Gariepy v. United States, 189 F. 2d 459 (C.A. 6 1951) 26
Holland v. United States, 348 U.S. 121 .....2, *passim*
Pinkard v. United States, 240 F. 2d 632 (C.A.D.C. 1957) 39
Remmer v. United States, 205 F. 2d 277 (C.A. 9 1953) 28
Rossi v. United States, 289 U.S. 89 29
Schuerman v. United States, 147 F. 2d 397 (C.A. 8 1949) 27
Smith v. United States, 236 F. 2d 260 (C.A. 8 1956), cert. denied 352 U.S. 909 36

PAGE

Smith v. United States, 348 U.S. 147 ..... 19, 28
Steele v. United States, 222 F. 2d 628 (C.A. 5, 1955) 34
United States v. Altruda, 224 F. 2d 935 (C.A. 2 1955) 35
United States v. Calderon, 348 U.S. 160 19
United States v. Caserta, 199 F. 2d 905 (C.A. 3 1952) 34
United States v. Clark, 123 F. Supp. 608 (S.D. Cal. 1954) 35
United States v. Fenwick, 177 F. 2d 488 (C.C.A. 7 1949) 34
United States v. Ford, 237 F. 2d 57 (C.A. 2 1956) .. 25
United States v. Freeman, 302 F. 2d 347 (C.A. 2 1962), cert. den. 375 U.S. 958 39
United States v. Kleinman, 167 F. Supp. 870 (E.D.N.Y., 1958) 34
United States v. Massei, 355 U.S. 595 .....19, *passim*
United States v. O'Connor, 237 F. 2d 466 (C.A. 2, 1956) 34
United States v. O'Malley, 131 F. Supp. 409 (E.D. Pa. 1955) 34
United States v. Rully, 143 F. Supp. 283 (D. Conn. 1956) 35
United States v. Trumblay, 208 F. 2d 147 (C.A. 7 1953) 39
United States v. Vardine, 305 F. 2d 60 (C.A. 2 1962) (reversed in part) 35
Vloutis v. United States, 219 F. 2d 782 (C.A. 5 1955) 35
Warring v. United States, 222 F. 2d 906 (C.A. 4 1955) 26

Statutes

18 U.S.C. §3500 4
26 U.S.C. §7201 ..... 3, 4
26 U.S.C. §7203 40
28 U.S.C. §1254(1) 2
§7201, Internal Revenue Code 39, 40

United States Constitution

	PAGE
Fourth Amendment	4
Fifth Amendment	4
Sixth Amendment	4, 36

Miscellaneous

P–H Fed. Tax ¶ 19,195	17
83 L. Ed. 893	40
96 L. Ed. 374	40
97 L. Ed. 203	40

IN THE

Supreme Court of the United States

October Term, 1966

No.

JOSEPH F. SCHIPANI,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Joseph F. Schipani, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this case on June 29, 1966.

Opinions Below

The opinion of the Court of Appeals, printed as Appendix A in the separately-bound "Appendix to Petition for Certiorari" filed herewith (cited *infra* as "App. Pet. Cert."), is not yet reported. The opinion of the District Court* is not reported; it is printed as Appendix B in App. Pet. Cert.

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* This was a non-jury case and the District Court's lengthy opinion embodies its findings and conclusions.

Jurisdiction

The judgment of the Court of Appeals was entered on June 29, 1966 (Appendix C, App. Pet. Cert.). The time for filing this petition for certiorari has been extended to and including August 28, 1966 (a Sunday). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Should this case of criminal conviction for income tax evasion (non-filing of returns) be reviewed by this Court as presenting what is believed to be the most extreme instance, in reported decisions since the 1954 *Holland* decision (*infra*), of the use of the "net worth" method, this case having strikingly transgressed the extremes of the analytical limits of the "net worth" method which this Court marked out in *Holland* v. *United States*, 348 U.S. 121 and related decisions as setting the outside limits of the permissible due process use of this type of circumstantial evidence in criminal prosecutions for Federal tax evasion? Does the case present a suitable occasion for a renewed supervisory review by this Court of "net worth" standards of criminal prosecution in the light of the twelve years of prosecutive and judicial experience in this area since *Holland*?

2. Was petitioner denied a fair trial and due process of law by misuse of the net worth method under the facts of this case?

3. Was the nothing-more-than circumstantial evidence on which this net worth conviction is solely based in-

sufficient for submission to the trier of the facts and for conviction under the rule of reasonable doubt?

4. Was petitioner denied a fair trial in violation of due process of law and of his privilege against self incrimination, as well as his right to counsel and to be free of unreasonable search and seizure, by the reception in evidence, over defense objections, of a statement taken from petitioner while he was under coercive authority in a Federal prison, the statement being the indispensable starting point of the prosecution's entire proof of opening net worth in this case?

5. Was petitioner denied a fair trial, due process of law and the Sixth Amendment right of confrontation, by reason of conferences conducted by the Trial Court in Chambers privately with the Government attorney and out of the presence and over the objection of petitioner and his attorney, in connection with the screening of Jencks Act materials? (Not argued herein but preserved in the event of the granting of certiorari.*)

6. Was petitioner denied a fair trial by rulings which permitted the Government to impeach one of its own witnesses?

7. Does the conviction for "willful" tax evasion under 26 U.S.C. §7201 on the charge of failure to file income tax returns violate the due process prohibition against penal statutes which are void on account of vagueness?

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* This issue is discussed in the opinion of the Court of Appeals at App. Pet. Cert., pages A-12 to A-13.

Constitutional Provisions and Statutes Involved

The case involves the Fourth Amendment (search and seizure), the Fifth Amendment (due process and self incrimination) and the Sixth Amendment (right of counsel and confrontation) of the United States Constitution. It also involves 26 U.S.C. §7201 and 18 U.S.C. §3500 (the Jencks Act).

Statement of the Case

1. Introductory

Petitioner was convicted in the United States District Court for the Eastern District of New York (Rosling, D.J.), after a trial without a jury (petitioner having waived a jury, R. 3546*), on five counts of personal income tax evasion through failure to file returns for the years 1956-1960, in violation of 26 U.S.C. §7201,** and was sentenced to three years on each count to run concurrently plus fines of $2,500 on each count totalling $12,500, petitioner to stand committed until the fine is paid (R. 3901). The United States Court of Appeals for the Second Circuit affirmed the conviction. Petitioner is free on bail pending certiorari.

This case of income tax evasion by failure to file returns was tried by the Government on the "net worth" theory.

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* By permission of the Court below, printing of appendices was dispensed with in the appeal, and instead photocopies of the entire trial testimony plus the docket entries, the indictment, certain motion papers and other written presentations, the written opinion of the District Court, the judgment, and the notice of appeal were filed. Photocopies of exhibits were filed *via* a supplemental filing. Page references to the record herein are to the pages of the record as docketed in the Court below, or to appropriate pages of specific items suitably identified *infra*.

** The indictment is at R. 3487-3491.

Petitioner introduced no proof at the trial; he rested on the insufficiency of the Government's proofs.

The trial testimony and the exhibits in this case are voluminous. However, means are fortunately at hand for a relatively simplified presentation here. At the conclusion of this non-jury trial the Government submitted a detailed factual and legal brief, with exhausive citations to the trial record, and that brief of the Government was treated by the parties in both of the Courts below as in essence setting forth the Government's complete factual statement of what it thought it had proved and of why such was sufficient for conviction; that brief of the Government (as well as the defendant's brief and the Government's reply brief—all filed after trial and before verdict) was made a part of the record on appeal.* The Government's systematic cataloguing of the trial proofs in the aforementioned brief (as constituting the Government's factual theory of the proofs) affords, then, a convenient shortcut to the voluminous trial record; as above intimated, we were content in the trial and the appeal and we are content here to accept the Government's own references to the testimony and the exhibits as constituting those items on which the Government asserts its case; we do not, of course, accept in all instances the Government's evaluation of the proof. Also, the Trial Court wrote a lengthy opinion which contained detailed factual findings all of which are more or less elaborately footnoted to the trial record, and these record-annotated findings afford a further convenient shortcut through the massive trial record as setting forth a systematic catalogue of the Trial Court's factual theory of

* The Government's brief is in the record as pp. 3682-3765; the defendant's brief is in the record as pp. 3555-3680; the Government's reply brief is in the record as pp. 3766-3801.

the proofs (App. Pet. Cert., Appendix B). To be sure, there are important areas of the proof which we dispute in one aspect or another, but as to all such instances we shall point the Court to the necessary portions of the record that have to be more distinctly examined for those purposes.

At the places *infra* where we shall be citing the Government's brief or the Trial Court's opinion we shall refer to them respectively as "G.B. " and as "Op. ". In some instances we shall refer to the marshalling of record citations as given in the Government's brief or in the Trial Court's opinion, rather than referring directly to the record itself. Photocopies of the Government's brief and of the Trial Court's opinion are filed as a part of the Record herein. In view of the availability of the latter photocopies, we shall generally refer to the original pagination of the Government's brief and the Trial Court's opinion rather than to the subsequent pagination adopted in the docketing of the record on appeal.

2. The Basic Categories of the Trial Proofs*

The indictment years being 1956-1960, the primary "opening net worth" date was January 1, 1956 (or December 31, 1955). The Government attempted the usual evolutionary or retrospective demonstration of opening net worth as of the latter date, the attempted trace-back proofs having commenced in this case with the date of February 10, 1943. On the latter date the defendant was alleged to have made a statement to Federal Prison officials at Milan, Michigan, where he was then incarcerated, as to his then assets.

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* Record references for the recitals in the following synopsis appear in other connections *infra*.

The Government then purported to trace the defendant's financial circumstances from February 1943 to the eve of the indictment period (1956-1960), and claimed to have established that the defendant entered the indictment period with zero cash. This branch of the Government's proofs consists of a "demonstration" (we assure the Court that we are not exaggerating in the following characterization) that because the defendant started out in 1943 with only a certain alleged amount of assets ($1350), and because from then until December 31, 1955 the defendant expended some $75,000 (at least), the defendant therefore had spent his original $1350, and therefore also he entered the indictment period with zero cash. Astounding though it may seem, this in essence* was the Government's "proof" of alleged zero cash at the commencement of the indictment period.

As to the years comprehended within the indictment period (1956-1960) the Government introduced voluminous proof of expenditures, with a view to tracing the alleged increases in net worth. Those expenditure proofs are not in themselves disputed by us, but we contend that they are meaningless without a satisfactory proof of opening net worth.

On the vital requisite of proof of "likely source" of unreported taxable income during the indictment years, the Government's showing was for all practical purposes *nil*, as we shall demonstrate.

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* We say "in essence", because two other circumstances relied on by the Government in this branch of the case—(1) some petty items of late payments, a few petty borrowings, etc., and (2) lack of "leads" from the defendant—are in their nature wholly ineffectual, as we shall show, to negate the overriding factual picture, under the Government's own proofs, that defendant had access to ample assets during the years in question (1943 to end of 1955).

Likewise as to the vital requisite of distinct allocation of allegedly unreported income to each of the five indictment years, the Government's proof is *nil*, subject only to the unimportant qualification that there were purely computational proofs which failed utterly to reach in even the remotest way the substantive requirement of this year by year rule; this too will be demonstrated in detail.

The proofs of willfulness, which depended on proof of alleged consciousness of guilt etc., are also shown *infra* to have been manifestly inadequate for submission to the trier of the facts or for conviction.

3. The Trial Proofs

a. *Opening Cash In February 1943*

As noted, the opening net worth zero cash figure at the commencement of the first indictment year (1956) evolved from the starting point of the $1350 figure in the prison statement in February 1943. This prison statement, called an "Admission Summary" (Government's Exhibit 9, par. 10) reads as follows:

> 10. *Resources:*
> This man claims that he has no property, but later admitted that he had a $2,000.00 insurance policy with the John Hancock Life Insurance Co. and that he left his wife approximately $1,350.000 in cash. He later stated that they owned their own furniture."

Neither of the Courts below were troubled by the *in limine* problem of the probativeness of such a statement—i.e., the problem of whether it is not altogther to be expected that a prisoner would try to refrain from being

completely self-exposing to his jailers when they are grilling him about how much money he may secretly have.*

b. *The Proofs as to Petitioner's Subsequent Financial History—from 1943 to January 1, 1956, the "Opening Net Worth" Date.*

At G.B. 7 (its brief in the trial Court) the Government referred to testimony that while the defendant was in prison in 1943 and 1944, the defendant's brother, Ralph Schipani, had given small amounts to the defendant's wife at that time (R. 880-884); and that the defendant's sister gave small money gifts to the defendant's children (R. 1170-1171). This testimony would have some tendency to corroborate financial hardship in the defendant's family situation in 1943 and 1944, *if such stood alone in the record.* However, even in relation to the immediate two-year period in question (1943-1944) and, as we shall show in a moment, above all when taken in relation to the only truly meaningful data-picture (the overall picture for the years 1943 through 1955), this item of petty financial assistance from relatives recedes into insignificance for the purposes of this case. For, even in the two years 1943 and 1944, the Government's own expenditures data for the defendant and his family show, *inter alia,* the spending of some $1800 for rent, some $440 for insurance, and be it noted, the purchase of a United States Savings Bond ($56.25) (Government's Exhibit 282, Schedule A). The Exhibit just referred to lists expenditures for the two years totalling about $2350. And, as earlier noted, the

* During the motions after verdict the Trial Court, referring to the vigorously disputed issue as to the constitutional admissibility of this 1943 Prison statement (see item II in our "Reasons", *infra*), said (R. 3914-3915): "It is a critical issue in the case. If you are right I imagine there would be no conviction. * * *"

Government's expenditures analysis totally excluded all items of living expenses, except rent. The petitioner's family in 1943 and 1944 consisted of a wife and two infant children. Assuming that even so little as $20 a week was spent for their living expenses, the total expenditure figures for 1943 and 1944 would reach a minimum of not much under $5,000. True, the Government made some show of realistically allowing for its artificialized expenditure figures by *assuming* that the small doles from relatves amounted to as much as $500—which the Trial Court itself in effect commented was not credible (R. 3050-3051) —and by the further "tax accounting" expedient of "crediting" the defendant with just under $500 per year as an assumed income of a person during that period who would earn just under the minimum amount which would require the filing of an income tax return (Government's Exhibit 284, Schedule C). All in all, the Government concluded that petitioner could have had about $9800.00 to spend in the period 1943-1955 (G.B. 17-18).

The significant reality of the situation in years 1943-1955 is that, by the Government's own demonstration, petitioner must have spent at least seven or eight times as much money as the Government says he could have had—which of course negates the Government's basic contention in regard to opening net worth, *viz.*, that the petitioner could not have accumulated a substantial cash reserve prior to January 1, 1956 because his antecedent financial history displayed privation rather than abundance.

At G.B. 8-13 in the Court below the Government summarized various expenditures, 1943 to 1955 inclusive, shown upon its Exhibit 282. These expenditures, as the Govern-

ment noted at G.B. 18, totalled just under $48,000; again, be it noted, this did not include anything for living expenses (other than rent). The realistic total expenditures figure, then, would be something more nearly approaching at least $75,000, and probably considerably more.

There are specific indications, moreover, that petitioner's 1943-1955 expenditures were those of a man of easy financial means. Thus, in 1947, he paid $6,000 as a down payment in cash on the purchase of a house (R. 184, Ex. 282 Sch. 3). Thus also, in 1955 he paid a down payment of $1,504 in cash on the purchase of an automobile (R. 634-635, Ex. 80). From 1949 through 1955 he employed a domestic servant, at $700 per year (R. 1018-1019).

To the Government these very substantial figures of expenditure by petitioner in the period 1943-1955 prove only that he must have spent the $1,350 of cash which he told the prison officials he had in 1943! (G.B. 18).

c. *The Proofs as to Alleged Increases in Net Worth During the Prosecution Years*

This branch of the Government's proofs is set forth in G.B. 28-38, *re* petitioner's assets and liabilities over the five-year-prosecution period; G.B. 38-55, *re* petitioner's expenditures during that period; and G.B. 55-57, the computation of unreported income for each of the five years. The various specific items of expenditure which form the core of this part of the Government's case are not disputed and need not be described here. But it should be noted in this factual statement that the Government's entire position on this branch of the case stands or falls on the acceptability of its contentions as to "opening net worth". Of what

possible probative significance can it be to show that petitioner expended so-or-so much in the prosecution years, or that his assets and liabilities went through such-or-such changes supposedly denoting an increase in net worth, when, as we maintain, all of these financial happenings would be entirely explainable—without resort to any accusation as to unreported currently taxable income—on the basis of non-disproved (and indicatively true—i.e., the pattern of financial ease of petitioner in the pre-prosecution years) possession by petition of a prior cash reserve? This was recognized, in fact, with commendable candor, by the Government's expert witness Agent Massetti, who testified on cross examination that alleged increases in net worth were *assumed* by him to be attributable to unreported taxable income (R. 3431). And as to the testimony of Agent Rosman with respect to the "tax computation" (R. 3232-3285, 3291-3292; Government Exhibits 290, 291, 292), this witness, in turn, merely adopted Agent Massetti's assumptions which, again, had been based, as seen, on the idea that the Government had accurately proved petitioner's opening net worth. At R. 3273, the Trial Court asked Mr. Rosman, "You made a mathematical computation starting with assumptions that were not your own but supplied by the Special Agent's charts?", to which the witness replied, "Yes".

As was testified to by Agent Massetti himself, the correct answer was "Yes" to the following question, "And if you should be in error as to the assets of that taxpayer in your opening figures, then the whole remaining sequitur statement would be in error, would it not?" (R. 3346).

d. *The Proofs on the Question of Whether the Alleged Net Worth Increases in the Prosecution Years Came from Unreported Currently Taxable Income (The Problem of "Likely Source")*

The Government's factual contentions on this branch of the case appear at G.B. 58-69, where the Government put its position in two alternatives: (1) first it argued that there was no need to prove a "likely source" so long as "some source" of unreported currently taxable income is proved; (2) the Government then went on to contend that a "likely source" had been proved. Under our "Reasons" *infra* we treat the "some source" idea. The Government evidently does not have strong confidence in this "some source" approach, and it undertook to try to prove "likely source".

Thus, at G.B. 61-65, one such "likely source" in this case is said to be petitioner's "interest in a restaurant." Let us examine the "proofs" upon which this "restaurant" item depends. In *May 1961* petitioner's son was told by petitioner to list petitioner's occupation as a "restaurauteur" (G.B. 61). This alleged incident occurred some *five months after the expiration of the last prosecution year.* The same is true of the similar item of June 1961 (six months after the expiration of the last prosecution year) referred to at G.B. 62. Furthermore, even if it were permissible to infer from the aforementioned evidence that petitioner was *priorly* in the restaurant business, how could this "inference" be justifiably applied to any particular prior time period; does the "inference" stop as of the beginning or the middle of 1960; does it go back into 1959; and so forth? Nor did the argument that petitioner was "likely" in the restaurant business during any of the prosecution years, gain any serious probative weight from

the proofs connected with the witness Mr. Corwin (G.B. 62 et seq.). Mrs. Corwin's testimony was of the vaguest, most general and inconclusive sort; she placed petitioner's having once told her he was in the restaurant business as having occurred in a social conversation as long ago as twenty-five years before (R. 1239 et seq.). The Trial Court, after permitting the Government to impeach its own witness Mrs. Corwin (R. 2874-2877), concluded that Mrs. Corwin was untruthful, but it seems impossible to derive from the Trial Court's written opinion on this subject what conclusion, if any, the Trial Court drew by way of a "positive" date or time when petitioner is supposed to have told Mrs. Corwin he was in the restaurant business (Op. 39-40, App. Pet. Cert., pp. A-51 to A-53). In its eagerness to milk some possibility of a "likely source" out of this barren "restaurant" subject matter, the Government even adduced the "proof" that petitioner "was frequently at the Casa Bianca restaurant " (G.B. 64-65). The "restaurant proof" was "aided" also by testimony of a gardener, that in 1959 and 1960 petitioner had told him he would like to buy a plant for his restaurant (R. 348-351, 378, 380-381).

The second "likely source" is "labor activities" (G.B. 65 et seq.). This item is based in part on the testimony of Victor Matrunola, a real estate man, who said that in 1956 someone told him that petitioner was a labor consultant (R. 779 et seq.; Exhibit 112). Matrunola did not know who gave him this information. The Government nevertheless argued, by a supposed process of elimination, that the information must have come from petitioner himself. The information, according to Matrunola, was further supposed to have been to the effect that petitioner in his "labor con-

sultant'' work earned ''$125 per week *or* $12,500 per year''. This altogether vague Matrunola item was sought to be buttressed by the Government with testimony from the witness Jerry Gross (R. 1869-1989). There is no indication in Gross' testimony that petitioner presented or styled himself as a ''labor consultant''; at most the Gross testimony portrayed petitioner as having responded politely to a request from Gross for some kind of intercession in a labor dispute, all of which came to naught, because petitioner told Gross that he could not help him. The Government also called Martin Leonard, an attorney, to buttress its theory that petitioner was a labor consultant (R. 1109-1121). This alleged Leonard situation was one of utmost informality, the incident being that petitioner was sitting in Mr. Leonard's office one day when, in a casual conversation about labor difficulties, petitioner offered some kind of friendly intercession by way of putting Mr. Leonard in contact with a friend of petitioner's, whereupon Mr. Leonard himself pursued the matter after that.

The Government argued also that ''there was some evidence at the trial that petitioner was in contact with the Brooklyn Trade Waste Association in connection with his labor activities'' (G.B. 67). It is evident from the Government's own recitals of this testimony in its brief (G.B. 67-68) that the item in question has very little, if any, probative weight to establish that petitioner was a ''labor consultant'' or was deriving any income from any such line of activity. And we again note, as we did in connection with the ''restaurant'' theory, that petitioner's alleged ''likely source'' of income from the labor field is not even remotely allocated to particular prosecution years, nor is the amount of the supposed income indicated with any remotely suffi-

cient degree of certainty or even approximation to make it a meaningful factor in this prosecution.

The Government also suggested as a "likely source" that petitioner had "income from illegal sources" (G.B. 68-69), *but the Trial Court rejected this* (Op. 7, 43; App. Pet. Cert., pp. A-19 (finding No. 13), A-56 (fn. 17)).

e. *The Proofs of Allocation of Net Worth Increases to Individual Years in the 5-year Indictment Period.*

The only "showing" the Government made with respect to its year-by-year allocation burden (*infra*) consists of the testimony of the expert witness Agent Rosman, and the charts introduced through that witness (R. 3232-3285; Exhibits 290, 291, 292). Rosman's "tax computation" merely took the successive year-end figures of Agent Massetti for the prosecution years 1956-1960 as to alleged increase of net worth, and after making adjustments for tax-deductible items which he (Rosman) deemed proper and for statutory exemptions, he simply arrived at "taxable income" and, therefrom, at "tax liability", for each of the five years (Exhibit 290).

Thus, Agent Rosman's "tax computations" stand upon no better ground than Agent Massetti's "net worth" increase computations. Moreover, there is absolutely nothing in Rosman's testimony, or in his charts or schedules, or anywhere else in the record, from which the slightest clue is derivable either as to the *justification* (as distinct from mere arithmetical derivation) for the Government's arbitrary "year-by-year allocations" or even as to why the Government conceivably supposes that such justification may exist. For all that appears—and it must not be forgotten that we are dealing here with criminal charges which

must be proved beyond a reasonable doubt—the alleged net worth increases (and the arbitrarily derived "tax computations") for any of the last four years of the five-year prosecution period could have arisen from alleged unreported currently taxable income in the first year alone; and numberless other possible permutations and combinations in regard to this problem of year-by-year allocation inevitably suggest themselves in this amorphous posture of the Government's proofs on the point here under discussion. We are not suggesting that there were such net worth increases in the first year—1956—of the five-year prosecution period. But we do point out the dilemma, and we respectfully think it is an unresolvable dilemma, which the Government faces on the indispensable element of year-by-year allocation under its five-year catch-all "proofs" in this case. The dilemma is truly unresolvable, even with respect to the first of the five prosecution years, because there is surely no remotely sufficient support in the record for any blunderbuss conclusion that the entire alleged five years' net worth increases did derive from unreported currently taxable income during the first prosecution year alone.

The Trial Court's treatment of this vital issue of year by year allocation likewise does not go beyond the purely computational approach above described (Op. 5, 6, 7, 31, 32, 43, App. Pet. Cert. A-17, A-18, A-19, A-44, A-45, A-56).*

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* The problem is not assuaged by the fact that the prison sentences herein on the five counts are concurrent. The fines are cumulative. And aggrievement arises also in view of the familiar decisions that a criminal conviction of this type is "strong evidence of civil fraud" in an aftermath proceeding for tax deficiency. E.g., Alfred B. Cenedella, ¶ 62,039 P.H. Memo T.C.; Abraham Gallant, 26 T.C. 354 (1956); Richard F. Smith, 31 T.C. 1 (1958). The cases on this rule of "strong evidence of civil fraud" are comprehensively collected in P-H Fed. Tax ¶ 19,195.

f. The Proofs of Wilfullness

This is taken up in our "Reasons," *infra.*

4. The Decision of the Court of Appeals

We raised in the Court of Appeals essentially the points stated in our Questions Presented, *supra,* and that Court in affirming the judgment of conviction rejected our contentions. The core of the Court of Appeals' reasoning on the net worth issues is in the portion of its opinion commencing with the first full paragraph on page A-8 of App. Pet. Cert. and ending on page A-11. The Court of Appeals apparently agreed with us that there is something unsatisfactory in the Government's method of proving opening net worth here, i.e., the inconsistency of attributing increase of net worth to indictment-years expenditures, while ignorng expenditures in the pre-indictment period (1943-1955) and focussing only on the alleged 1943 opening figure of $1350 cash (the Milan prison statement) which, the Government goes on to reason, was exhausted by 1956. But while thus apparently recognizing that Schipani *must have had* either income or non-taxable cash in the pre-indictment period on an ample scale indeed (such as would plainly raise the profoundest sort of reasonable doubt, we contend, concerning the Government's zero-cash theory for the opening net worth date of December 31, 1955-January 1, 1956), the Court of Appeals nevertheless found it possible to apply the circumstantial evidence standards of the *Holland* case so as to affirm the conviction. This portion of the Court of Appeals' reasoning is, we respectfully say, altogether generalized and conclusory; see our "Reasons," *infra.* The Court of Appeals also found sufficient the proofs of "likely source" (see our description of those proofs under "d.", p. 13, *supra*).

Reasons For Granting the Writ

I.

Contemporary discussion of the law of "net worth" criminal prosecutions commences with the decision of December 6, 1954* in *Holland* v. *United States*, 348 U.S. 121, and the companion group of cases decided together with *Holland*.** An important gloss on the *Holland* decision was written by the Court on March 3, 1958† in *United States* v. *Massei*, 355 U.S. 595.

Of the several basic principles which the Court laid down in *Holland, in a declared effort* to guard against unjust convictions on the ever-dangerous theory of circumstantial evidence known as the "net worth" theory, five have a special application to the present case: (1) The Government must establish, reliably and by appropriately thorough investigation, the "opening net worth" of the defendant as of the commencement of the prosecution period, (348 U.S. at 127-128, 132 et seq.). (2) Alleged increases in net worth during the prosecution years must be shown to have derived from "currently taxable income" in the prosecution years (348 U.S. at 127-128, 137-138). (3) In turn, except under circumstances of the strongest negation of other sources of assets deriving from the pre-prosecution period or of a non-taxable character obtained during the prosecution

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* We are noting this exact date because of its turning point character, which should be borne in mind in reading all lower court decisions which may have preceded or followed the above date.

** *Friedberg* v. *United States*, 348 U.S. 142; *Smith* v. *United States*, 348 U.S. 147; *United States* v. *Calderon*, 348 U.S. 160.

† This date too should be kept in mind as a turning point date in reading lower court decisions in net worth criminal prosecutions.

period, the Government must prove a "likely source" of taxable income during the prosecution period (*ibid*).* (4) The alleged net worth increases during the prosecution period must be reasonably allocated to the appropriate tax year under the respective counts of the indictment under which the defendant is convicted (348 U.S. at 129). (5) Ultimately, the presumption of innocence and the rule of reasonable doubt remain an integral part of the criminal law in net worth prosecutions, it being unthinkable that the traditional burden of proof of the prosecution in a criminal case should be allowed to shift to the defendant in the slightest degree (*e.g.*, 348 U.S. at 127, 128-129, 138-139).

(In our above summary of the herein pertinent rulings of the *Holland* case we have indulged in some paraphrasing, but we are sure that we have not misstated the essential meaning.)

As mentioned in our last preceding footnote, in 1958 the Court, in *United States* v. *Massei,* 355 U.S. 595, took up further the subject of "likely source". The following features of *Massei* require attention in connection with our case: (1) The Court did not hold that proof of a likely source will never be necessary in a net worth prosecution; it held merely that such proof is not necessary in every case. (2) The only situation which the Court envisaged as dispensing with the need for proof of a likely source is that where "all possible sources of non-taxable income [are] negatived". This language about negativing all posible sources of non-taxable income means—as is clear from a joint reading of the *Holland* and *Massei* opinions (see below)—that what

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* This theme was further defined in the *Massei* case (details *infra*).

must be thus negatived in "all possible" aspects is the possibility of the defendant's having acquired, whether prior to or after the commencement of the prosecution period, assets which would go to explain the alleged increase in net worth during the prosecution period. In other words, the *Massei* language does not mean that the only thing the Government has to negative in "all possible" aspects is non-taxable income of the defendant *during the prosecution years*. The Government must also negative "all possible" sources of "income" or net worth increase prior to the opening net worth date. It is only when the Government thus negatives "all possible sources of non-taxable income" that, under *Massei*, there would be no necessity for proof of a likely source. This interpretation of the *Massei* language is convincing, as above suggested, in view of the *Holland* language (348 U.S. at 137-138) to which *Massei* refers. In that language *Holland* gives, as illustrations of "possible non-taxable sources of the alleged net worth increases", such items as "gifts, loans, inheritances, etc." These are items which would obviously pertain, in most instances at least, to the pre-opening net worth date. Furthermore, the language referred to from *Holland* shows that the Court, in there relieving the Government of the necessity of negating all such possible past sources, was placing emphasis upon the existence of sufficient proof of likely current taxable source. Conversely, in *Massei*, where the Court's attention was focused upon the non-existence of proof of a likely current taxable source, the Court stressed the countervailing necessity and importance of proof negating "all possible sources of non-taxable income".

Thus, under the combined rulings of *Holland* and *Massei*, the situation is that the Government must *either* negate all

possible sources of non-taxable income or of net worth increase, or it must prove a likely source of income during the prosecution years. The Government in no case may ask to be relieved of both of these burdens.

(Further as to *Massei*, it is to be noted that the Court did not reverse the Court of Appeals, whose opinion is reported at 241 F. 2d 895, but affirmed the latter Court's judgment (which had vacated the taxpayer's conviction) with the above described explanation of the rule to be followed in regard to proof of likely source. It still remained necessary for the Government, if desired to re-try the *Massei* case, either to negate all the possible non-taxable sources of income or of increased net worth, or to prove a likely current taxable source. Shepard's Citator does not indicate any subsequent history of the *Massei* prosecution.)

We suggested in our Question Presented No. 1, *supra*, that the present case is the most extreme instance of the application of mere circumstantial evidence (the "net worth" theory) to obtain criminal conviction in an income tax case since *Holland-Massei*. Since the tax payer-defendant here filed no returns and furnished to the Government no "leads", it is understandable that the Government's prosecutive officials would naturally importune the courts to let them stretch *Holland-Massei* to cover a case like this one if at all possible. But this is still a *criminal* prosecution, the presumption of innocence and the rule of reasonable doubt still apply, and we do not think that this Court in *Holland-Massei* intended to allow a circumstantial evidence conviction of the extreme sort here involved. It respectfully seems to us that if the judgment below in this case stands, the outermost extreme permitted limits of *Holland-*

Massei will have been strained past the breaking point. To correct the error and the injustice of the present case, and to re-survey the use of the net worth method of criminal prosecutions since *Holland-Massei*, the Court should take this case on certiorari.

Probably the most striking single incidence of the impermissible use of the net worth method in this case is in the all-important matter of proof of opening net worth beyond a reasonable doubt.

The Government contends (both Courts below agreeing) that it has met its burden of establishing an "opening net worth" by tracing, from 1943 to the end of 1955, a number of circumstances in the alleged financial history of petitioner, which supposedly lead to the conclusion that at the commencement of the prosecution period herein petitioner had zero cash. On February 10, 1943, the Government is sure, petitioner's total cash was $1350, because petitioner told his jailers that that was all he had turned over to his wife. Passing the question of the soundness of the novel suggestion that prisoners are so addicted to telling their jailers the exact 100 per cent truth about their financial assets as to justify importing into this picture some sort of doctrine of a legal presumption or of a legally binding "admission" for "net worth" income tax purposes, passing, we say, this intriguing new problem of tax law jurisprudence, it was seen in our Statement of the Case, *supra*, that the Government's theory of how its 1956 opening net worth "showing" was traced all the way forward from February 1943 presents the following peculiarities:

With a great show of thoroughness, the Government said it had proved that the petitioner's total assets available for

expenditure from 1943 to 1956 were about $9800 and that yet (the "yet" is ours) in that same period petitioner actually spent more than $47,000, *not including living expenses for himself and his wife and children,* which could scarcely have amounted to less than $2,000 to $3,000 per year in view of the Government's own depiction of petitioner's quite comfortable standard of living. Interesting in the extreme is the conclusion which the Government drew from its own demonstration that petitioner spent, then, apparently at least $75,000 when all he had was $9800 to spend, i.e., the Government's disarming conclusion is that this incontestibly proves that petitioner must really have spent every single penny of the $1350 of 1943 cash, and hence he could not have had any of this $1350 1943 cash left at the beginning of 1956. We assure the Court that we are not unfairly depicting the preposterousness of the Government's theory in this regard, for it was stated substantially to that same effect by the Government itself on p. 18 of its brief in the District Court (R. 3701).* In the face of these facts that, according to the Government's own figures, the petitioner had some $75,000 or more to spend (and spent it) from 1943 to 1956, what realistic "probative" significance can seriously be suggested as attaching to the Government's patchwork and pervasively discontinuous "proofs" of Schipani's having engaged in some borrowings, or late payments, etc., during the pre-prosecution period 1943-1955? And what possible remaining significance (if there ever was any) can attach to the pre-prosecution period outset-cash figure of $1350 in February 1943?

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* Also, as noted, the Court of Appeals was troubled by this feature of the case (App. Pet. Cert., page A-8).

The Government in the Courts below (G.B. 18-19, 25-28), cited authorities on the issues herein as to opening net worth, chiefly the *Holland* case, *supra*, as to which the Government (G.B. 18) urged that:

> "Since the defendant's known expenditures exceeded his available funds during this period, we may conclude that he did not accumulate any cash reserve during this period, and that the cash reserve that he had on hand in 1943 ($1350.00) must have been consumed by December 31, 1955."

The *Holland* facts are completely distinguishable because the defendants' claim in that case of a large cash hoard was negated by an unrelieved history of hardship and privation, with no remotest indication of any such picture to the contrary as is afforded by the picture of petitioner Schipani's comfortable means during the pre-indictment period in this case (see 348 U.S. at pp. 132-134). Similarly, *United States* v. *Ford*, 237 F. 2d 57, 62-63 (C.A. 2 1956), which has been relied upon in numerous cases to support the finding that a defendant had no cash accumulation at the beginning of the first indictment year because of evidence of privation, etc., is distinguishable from our case in several important respects. In *Ford* the defendant had given to the Government a great deal of information about his financial history *via* extra judicial admissions. Further, the Government introduced specific proof of "inconsistencies and fabrications in the defendant's extra-judicial explanations of his finances" (237 F. 2d at p. 60). The Court also remarked that "* * * the Jury may well have concluded that his constantly shifting explanations were incredible" (p. 61). As to the defendant's claim of a cash hoard, the Government introduced substantial independent evidence which

established that any such hoard had been exhausted by the acquisition of non-cash assets prior to the indictment period (p. 62). And since the claim of a cash hoard was deemed by the Court in *Ford* to be so conclusively negated, the Court took the view that specific proof of a likely source was not essential (cf. the *Massei* case clarification of *Holland* in this respect, *supra*); in any event there was some proof in *Ford* of opportunity for unreported currently taxable income through police graft (pp. 60, 64-65).

All of the other decisions cited by the Government and the Courts below on the issues of opening net worth are either wholly inappposite or are distinguishable on their facts. Thus, in *Warring* v. *United States*, 222 F. 2d 906, 910 (C.A. 4 1955), there was an undisputed likely source, namely, gambling: and the defendant had made disclosures and admissions to the agents (including permission to them to inventory the contents of a safe deposit box) from which it was meticulously shown that the defendant must have earned large sums during the indictment period and that the cash hoard found in his safe deposit box consisted entirely of previously accumulated money. Likewise distinguishable is the pre-*Holland* case of *Gariepy* v. *United States*, 189 F. 2d 459, 461-463 (C.A. 6 1951), cited by the Government and the Courts below for negation of a cash accumulation and for the point of failure to provide the Government with leads as justifying the conclusion that the defendant had no appreciable cash on hand at the beginning of the first indictment year. In *Gariepy* the defendant was a physician (hence there could be no dispute, of course, as to "likely source"); and the defendant had filed non-taxable returns during the years in which he claimed to have been accumulating a cash reserve and, furthermore, had been in

rather severe financial distress throughout this period, with no indication (as is present in our case) of a mode of life reflecting ample means. As to the defendant's having supplied the Government with no leads, the Court in *Gariepy* pointed out that a "nest egg" suggestion by defendant's counsel "borders on the fantastic" because the record was absolutely barren of any indication that the defendant during the period of the supposed "nest egg" accumulation was in any financial condition other than one of severe distress—again, in contrast with the situation in our case. Likewise in the pre-*Holland* case of *Schuerman* v. *United States,* 147 F. 2d 397, 399 (C.A. 8 1949), cited against us in the Courts below as to opening net worth with specific reference to negation of a cash accumulation, "likely source" was no problem because the proof was undisputed that the defendant ran a numbers game, and although the Court said that the Government's evidence did not exclude the possibility of a cash hoard, analysis of the defendant's income picture (from his numbers business) before and during the indictment years, especially in the light of the World War II prosperity years (which coincided with the indictment years), made it unlikely that the defendant's accumulation of capital in the pre-indictment years could have produced a cash hoard in the amount claimed or needed to overcome the Government's showing of unreported income; at least such was deemed sufficiently unlikely to justify disapproval of the Trial Court's discretion in submitting the case to the Jury or of the Jury's verdict. Here again, the Government's case, unlike the situation in our case, was concretely structured upon tangible factors in regard to opening net worth, and of course there was no doubt on the score of likely source.

On the negating of cash accumulation we were also confronted in the Courts below with *Friedberg* v. *United States,* 348 U.S. 142, 143-145 and *Smith* v. *United States,* 348 U.S. 147, 157-158, which were companion cases with *Holland.* In *Friedberg* there were overwhelming facts of privation which negatived any possibility of accumulating a cash hoard, and no indications of an accompanying situation of ample means, as in our case. In *Smith,* it was held that similar facts as to a history of straitened means were corroborated by the defendant's own tax returns during the period when the cash accumulation was supposedly made. The pre-*Holland* case of *Remmer* v. *United States,* 205 F. 2d 277, 287 (C.A. 9 1953), was cited against us in the Courts below as to negation of a cash accumulation and as to failure of the defendant to supply the Government with leads. *Remmer* found it was significant that although reference had been made during the trial to a safe deposit box in which the defendant purported to keep money, the defendant made no attempt in any way at the trial to prove that substantial funds were in fact kept in the box, and requests by the Government to examine the contents of the box were refused. In any event, the Court further noted, even if a certain sum of $17,000 which was alleged to have been put in the box had remained there as of the time of the "opening net worth", it still would have been insufficient to overcome the Government's showing of unreported income of nearly $15,000 for the first prosecution year (205 F. 2d at p. 287). Also, there was no dispute in the *Remmer* case that the Government had proved a "likely source". In the pre-*Holland* case of *Barcott* v. *United States,* 169 F. 2d 929, 932 (C.A. 9 1948), cited against us below on the question of cash accumulation, the proofs were that the defendant had

a business whose affairs were very thoroughly audited by the agents with the plain conclusion that the business could not have produced a certain cash accumulation which the defendant did in fact have; and, more important, that the defendant had offered a cash bribe to one of the agents.

On the issue of failure of a defendant to furnish the Government with leads, there was cited against us in the Courts below the pre-*Holland* case of *Rossi* v. *United States,* 289 U.S. 89, 91-92. This was an unregistered still case, and the opinion contains a general statement of the principle that, "It is not incumbent on the prosecution to aduce positive evidence to support a negative averment the truth of which is fairly indicated by established circumstances and which if untrue could be readily disproved by the production of documents or other evidence probably within the defendant's possession or control" (pp. 91-92). The operative words in this language are, "the truth of which is fairly indicated by established circumstances"—the very issue presented in our case. Finally, *Holland* was also cited against us in the Court below as to the defendant's failure to supply the Government with any leads. The defendants in *Holland* had supplied numerous leads, which the Government had indeed checked out and had found totally unconvincing (348 U.S. at pp. 135-136). The only other item in the *Holland* case on the question of leads which needs to be mentioned—but it is important—is the Court's language at pp. 138-139, that "*Once the Government has established its case,* the defendant remains quiet at his peril" (emphasis added). *This statement in the Holland case has no application to our situation, we respectfully contend, because it is our position that the Government has not "established its case".*

* * * * *

From the foregoing, the Government's theory as to the alleged increases in net worth during the prosecution years is at once seen to be mere bootstrap-levitation, *i.e.*, as soon as one perceives that the Government's theory on this phase is composed, literally, of nothing more than the following two elements: (a) that petitioner made expenditures during the prosecution years of such-or-such amounts, and (b) that the increase of assets yielded by these expenditures (or represented by the funds from which they were defrayed) must have denoted an *increase* of net worth because the cash assets over the "known" assets in the "opening net worth" had been zero. In other words, the Government's entire case of alleged increase of net worth collapses with the collapse of its case on "opening net worth".

This last-suggested conclusion is reinforced (if such were needed) by what we showed in the Statement of the Case, *supra*, is the really *nil* probative achievement of the Government on the issue of whether the alleged increases of net worth in the prosecution years came from "current taxable income", i.e., from a "likely source". The Government's few merely insinuational or suspicion-founded "proofs" of "likely source" are nothing more than that —mere insinuation and suspicion. And, as noted, this phase of the Government's theory is sought to be buttressed by resort to the "some source" concept. At G.B. 58-61 the Government cited several cases in support of its "some source" contention, relying chiefly, it seems, upon *Ford* v. *United States*, 237 F. 2d 57, 63-65 (C.A. 2 1956), and citing also the *Massei* case, *supra* (355 U.S. 595). But, as seen, *Massei* frees the Government of the need of proving a "likely source" only when "all possible sources of non-taxable income [are] negatived"—which means that all

such possible sources must be negatived both with respect to accumulation of assets which form part of the opening net worth, and with respect to currently taxable income during the prosecution years. The *Ford* case, upon which the Government so strongly relies, was, as we earlier pointed out, a case of the type which this Court apparently had in contemplation in *Massei,* i.e., a case where the Government had conclusively negated the accumulation of a cash reserve, prior to the prosecution years, in sufficient amount to account for the alleged net worth increases during the prosecution years. We respectfully wish to make it clear that we are not attacking the "some source" concept in itself, when such is presented on the facts in a proper case. That is, conceding the validity and the authority of the "some source" rule, we simply point out that it has no application to our case, because the Government's failure in our case to establish an acceptable opening net worth precludes its reliance merely upon the "some source" doctrine, and obliges the Government to undertake the burden of proving a "likely source"—by something more than mere insinuation or suspicion as has here been essayed.

* * * * *

The Government's theory of how it met its burden of proving that the alleged net worth increases during the five prosecution years are reasonably allocated in each instance to an appropriate tax year under the respective five counts of the indictment amounts, once again, to nothing more than bootstrap levitation. For, here again everything stands or falls (in the Government's case) on the soundness of the zero cash assumption in the "opening net worth", since, after reasoning forward in time from this assumption the Government's expert witnesses Massetti

and Rosman then did nothing more than to take five arbitrary calendar-year-end dates (for the years 1956-1960) as of which to strike five successive yearly net-worth-increase accounting balances which in turn reflected nothing more than that the defendant had spent asserted amounts of money and had acquired asserted assets, but nowhere in this whole picture is there one single fact from which anyone can conceivably say that the respective asserted "net worth increases" for each of the five years came from unreported taxable income during any particular one of those years.

* * * * * *

The Government's position on proof of wilfulness (*via* "consciousness of guilt") is stated at G.B. 71-81.

First, it is adduced that petitioner did not file tax returns or pay taxes during the indictment years (G.B. 71). How this is supposed to show "wilfull evasion" except upon a classic application of the logical fallacy known as *petitio principii,* mystifies us. If petitioner is innocent of the charges in this indictment, as we claim he is, there were no tax returns for him to file. If he is guilty—the charge being tax evasion by failure to file returns—the fallacy in the Government's argument becomes that of simple pleonasm.

Next, it is alleged that "the defendant attempted, by various devices, to conceal his true income during the indictment years", and in support of this assertion several instances are recited in which petitioner allegedly did not use his true name or otherwise dealt furtively (G.B. 71-79). It is the Government's contention that the several items in question were "devices, to conceal * * * true income", whereas our position is that until and unless such a conceal-

ment of true income during the indictment years is found upon proper evidence, it is absolutely pointless, both in law and in fact, to attack the defendant with tendentious items of this character. If Schipani was guilty of the charges in this indictment, the items listed in G.B. 71-79 are admittedly helpful to the Government in meeting its burden of proving willfulness. But if, upon the final probative "balance sheet" of the record in this criminal prosecution, Schipani's guilt has not been sufficiently established independently of these alleged indicia of willfulness, i.e., if the Government (as we claim) has failed to prove a *prima facie* case of guilt beyond a reasonable doubt on the anterior (anterior, that is, to any reaching of the willfulness issue) elements of opening net worth and increased net worth in the prosecution years attributable to unreported currently taxable income, then it is not only idle but unfair to give any consideration whatever to the Government's alleged instances of willfulness through concealments of identity or other furtiveness.

Our argument on this issue of alleged wilfulness could end here. However, we should like to call attention to certain sheer human realities of the situation. If, as we contend, the present trial record leaves petitioner Schipani's alleged guilt not proven either "prima facie" or beyond a reasonable doubt, then it becomes proper as a matter of logic and of similar human experience to discern that an individual whose possession of ample past-acquired financial means and whose life background in other respects causes him to fear (rightly or wrongly) a "Javert" sort of police hounding, would, in time, tend to seek protective coloration in hopes of rendering himself less conspicuous. Even Victor Hugo's hero in Les Misarables had not had a completely "clean record" according to the standards of the

penology of organized society; and who, of those who have read that moving literary document, can fail to respond with a sympathetic heart to the plight of the debt-discharged convict as he prayerfully lives out the remainder of his life with reluctant "furtiveness".

* * * * *

"* * * [B]are figures have a way of acquiring an existence of their own * * *" (*Holland* v. *United States,* 348 U.S. 121, 128).

This whole case is put together from "bare figures", and from arithmetical computations that are equally "bare" of probative raiment judged by any minimally fair test for criminal prosecution under American constitutional standards of due process and under our traditions of presumption of innocence. There have been, since *Holland,* Federal decisions which have applied the net worth theory in the fair and proper way which *Holland* contemplated, for the protection of defendants. We wish that we had the space—already over-exhausted in this unusually lengthy petition—to note in detail the facts and the reasoning in some of the latter cases, e.g., *United States* v. *O'Connor,* 237 F. 2d 466 (C.A. 2, 1956); *Steele* v. *United States,* 222 F. 2d 628 (C.A. 5, 1955); *United States* v. *Kleinman,* 167 F. Supp. 870 (E.D.N.Y., 1958); *United States* v. *O'Malley,* 131 F. Supp. 409 (E.D. Pa. 1955).

Considerations of space limitation likewise oblige us, in connection with the following additional cases we have found which reverse convictions or adjudge acquittal in net worth and similar cases, merely to list the citations: *United States* v. *Fenwick,* 177 F. 2d 488 (C.C.A. 7 1949); *Bryan* v. *United States,* 175 F. 2d 223 (C.A. 5 194), aff'd 338 U.S. 552; *United States* v. *Caserta,* 199 F. 2d 905 (C.A. 3 1952);

Demetree v. *United States,* 207 F. 2d 892 (C.A. 5 1953); *Dupree* v. *United States,* 218 F. 2d 784 (C.A. 5 1955); *Vloutis* v. *United States,* 219 F. 2d 782 (C.A. 5 1955); *United States* v. *Altruda,* 224 F. 2d 935 (C.A. 2 1955); *United States* v. *Vardine,* 305 F. 2d 60 (C.A. 2 1962) (reversed in part); *United States* v. *Rully,* 143 F. Supp. 283 (D. Conn. 1956); *United States* v. *Clark,* 123 F. Supp. 608 (S.D. Cal. 1954).

II.

As regards the Milan Prison "Admission Summary" which purported to contain a statement by petitioner Schipani to his jailers in February 1943 as to the amount of his then assets, we note: Prior to the trial herein we moved to suppress this item, for inspection of the Grand Jury minutes to ascertain whether the item had been used by the Government before the Grand Jury, and to quash the indictment (see the separate transcript on the motion to suppress, separately numbered pages 1-91 in the Record herein; said motion to suppress is in the record at pages 3492-3503, and supplemental motion papers in the form of a memorandum for defendant appear at R. 3504-3538). These motions were denied, and when they were renewed after verdict they were again denied (R. 3913-3915). As earlier noted, in the colloquy on the renewal of the motions after verdict the Court acknowledged with respect to this issue of the Milan Prison statement that, "It is a critical issue in the case. If you are right I imagine there would be no conviction. * * *" (R. 3914-3915).

We are handicapped, by the space limitations of this petition, in presenting full certiorari argument concerning this important issue. However, our contentions are extensively set forth in the above cited motion papers, which are included in the photocopied materials which we have filed in

this Court. We are obliged to request the Court to examine those motion papers, and the pertinent stenographic transcript of the hearing on the motion, in lieu of a *de novo* presentation in this petition. To repeat, the pertinent items are in the Record at pp. 1-91 (separately numbered pages of the transcript on the motion to suppress), and R. 3492-3538 (the motion papers and memorandum).

The gist of our position in the aforesaid motion proceedings was as follows: The February 1943 prison statement was taken from the defendant in a compulsory setting. Disclosure thereof in this trial worked a violation of due process of law, a breach of the privilege against self incrimination, and an unconstitutional search and seizure;* and disclosure thereof before the Grand Jury necessarily worked the additional prejudice of revealing to the Grand Jurors that Schipani had been a Federal prisoner in 1943. These disclosures also violated the Government's own rules and regulations for preserving the confidentiality of such prison information.

The Trial Court's written opinion, at op. 10-13 (App. Pet. Cert., pages A-21 to A-26, fn. 4) recited its reasons for receiving the prison statement in evidence. The Court of Appeals' brief discussion appears in App. Pet. Cert., pages A-7 to A-8.

Supplementing our aforementioned motion papers on this issue, we offer the following observations concerning the case of *Smith* v. *United States*, 236 F. 2d 260 (C.A. 8 1956), cert. denied 352 U.S. 909, which was cited by the Trial Court. The *Smith* case involved (see 236 F. 2d at 265), three documents of an undescribed character which the ap-

* In the Courts below we omitted to refer to the Sixth Amendment right of counsel (see Question Presented No. 4, *supra*).

pellant had executed while in the penitentiary, and one document consisting of an interview before the Board of Parole, all of which documents were received in evidence to show that the appellant had claimed to have no assets while in prison. The first three (undescribed) documents were held properly admitted; the parole hearing item was apparently deemed improperly admitted, but the error was held harmless because the item was merely cumulative. Apparently the only objection for the appellant in the *Smith* case as to these documents was that the Federal prison regulations established confidentiality, and this argument was rejected by the Court. No issue was raised as to self incrimination, so far as the *Smith* decision indicates.

We call attention also to the granting of certiorari on March 21, 1966 in *Costello* v. *United States,* — U.S. —, 16 L. Ed. 2d 205, Oct Term 1965, no. 826, where the issue is as to violation of the privilege against self-incrimination through the registration requirements of the Federal wagering tax statutes. We cite this as importing at least a strong suggestion that the Court is taking up for further consideration the large question of the effect of compulsory Federal interrogational processes, in a regulatory (or penal) setting, upon the privilege against self incrimination. The analogy to our situation is that Schipani as a Federal prisoner in 1943 was in every practical effect compelled to give a statement to his jailers as to his then assets.

III.

Mrs. Corwin a longtime friend of petitioner Schipani's, was called as a witness by the Government with a view to showing that Schipani had once told her he was in the restaurant business (i.e., with a view to proving "likely source"). Mrs. Corwin's testimony is collected at G.B.

62-64. When Mrs. Corwin's testimony proved unsatisfactory to the Government because she stated the aforementioned conversation as having been as much as twenty-five years ago, the Government offered impeaching testimony by Agent Wynne, who was permitted to testify over defense objection (R. 2868 et seq.) that he had been present at an interview in the prosecutor's office when Mrs. Corwin had given different answers than those which she gave in her trial testimony.

The issue which we urged, unavailingly, before the Courts below was whether the Government should be permitted to impeach Mrs. Corwin by testimony from Government agents based upon an alleged written report of the agents describing or summarizing alleged extra-judicial pretrial statements to the agents by the witness Corwin. Defense counsel especially requested the Courts below to consider that the problem was primarily and indeed decisively one of *hearsay,* rather than being merely an instance of the ordinary problem of a party's right to impeach its own witness with a prior inconsistent statement. We urged that the matter had gone beyond any proper form of the conventional exercise of a party's right to impeach its own witness with a prior inconsistent statement. That stage of the situation was finished when the Government, much earlier in the trial, failed in its effort to break down the witness Corwin by showing her or questioning her about the agents' report or summary of her alleged prior statements to them.*

* As a matter of fact, it may well be that the Government was allowed to go too far even in that prior stage (the questioning of the witness Corwin herself), i.e., it is strongly arguable that, since there was not involved any prior signed or sworn statement of the witness herself, the most that the Government should have been permitted to do was to show the agents' summary or report to the witness for refreshment of her recollection.

For the Government to return to the fray proffering testimony of the agents themselves that the witness said to them the things attributed to her in the agents' written summary or report, was an astounding affront against the hearsay rule in one of its most cardinal aspects. We are unable to cite a case "on all fours", but we strongly suspect that our inability reflects the fact that Government prosecutors (whether State or Federal) have seldom if ever attempted so extraordinary a testimonial procedure in a criminal case. The applicable legal principles, nevertheless, are scarcely in doubt. Cf. *United States* v. *Trumblay*, 208 F. 2d 147, 151 (C.A. 7 1953); *Pinkard* v. *United States*, 240 F. 2d 632, 633 (C.A.D.C. 1957). A word as to the case of *United States* v. *Freeman*, 302 F. 2d 347 (C.A. 2 1962), cert. den. 375 U.S. 958. *Freeman* merely applies the modern rule that a party may impeach his own witness without the older common law restrictions; and *Freeman* does this, be it noted, in the setting of the question of whether a defendant in a criminal case should be allowed to do this to Government agents who have been called to the stand by the defense. *Freeman* in no wise reaches the question of the hearsay abuses which the Government perpetrated in our case.

IV.

At the motions after verdict (and in the Court below) we asserted the following constitutional contention (R. 3908-3913): In the absence of a much more clear manifestation of Congressional intent in §7201 of the Internal Revenue Code, it is a violation of due process of law to prosecute on a theory of wilfull evasion where the sole gravamen of the offense is non-filing of income tax returns. Under the

present wording of §7201 the construction of the statute so as to allow such a prosecution amounts to judicial legislation and denies due process of law because of the failure of the statute adequately to apprise a defendant of any such supposed prohibitory or penal intent by Congress itself. What we are here invoking is the familiar constitutional rule known as the rule of voidness on account of vagueness. (the rule is annotated in 83 L. Ed. 893, 96 L. Ed. 374 and 97 L. Ed. 203). It must be remembered that §7201 is a felony provision, and it is our position that if Congress had intended to attach the grave character of felony to a mere failure to file income tax returns it would have said so in plain words—as it expressly did do in the misdemeanor provisions of 26 U.S.C. §7203. We realize that there have been previous criminal prosecutions under §7201 on the theory of wilfull evasion by failure to file, but we believe that the constitutional question which we are now presenting has not been expressly considered or ruled upon by this Court, and we are not familiar with any lower Court decision that has passed on this constitutional question.

CONCLUSION

It is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

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